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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITIONER'S REPLY BRIEF

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I. The Court Of Appeals Erred In Reversing, Rather Than Simply Vacating, The Trial Court's Judgment, And Contrary To Plaintiff's Claim, That Error Was Not Harmless.

The district court conducted a bench trial on plaintiff's Title VII claims, before holding a jury trial on her parallel §1983 claims.[1] That was improper, because the trial judge's findings collaterally estop any jury which subsequently tries the §1983 claims, thereby depriving the litigants of their right to jury trial. Under *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), the Court of Appeals was required to *vacate* the bench verdict and *remand* for jury trial of the §1983 claims. Instead, the appellate court *reversed* the bench verdict and entered judgment for plaintiff. That creates exactly the same estoppel problem as did the original bench verdict, only now it is defendant (instead of plaintiff) whose right to jury trial is lost through estoppel.

This Court should grant certiorari, then vacate the appellate decision and remand for jury trial of the §1983 claims. Even plaintiff *expressly concedes* "such a result would normally be required." (Respondent's Brief In Opposition, p. 5).

However, plaintiff tries to escape the rule established in *Lytle* by noting that here the appellate court reversed, rather than affirmed, the district court. In plaintiff's view, this renders the failure to remand harmless error, because the same reasoning which led the Court of Appeals to reverse the *judge's* verdict for defendant necessarily would apply to any *jury* verdict for defendant: "Even if a jury would somehow [find for defendant] . . . the [district] court would have to grant

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[1] "Plaintiff" refers to plaintiff-respondent Therese Farber, while "defendant" refers to defendant-petitioner School Board.

plaintiff a judgment notwithstanding [the] verdict." (Respondent's Brief In Opposition, p. 7).

Plaintiff is wrong, because the standard for granting JNOV after a jury verdict is significantly different than the standard for reversing a bench verdict. Just because the Court of Appeals reversed the judge's findings under Fed.R.Civ.P. 52(a), that does *not* automatically mean it could order JNOV under Fed.R.Civ.P. 50(a). A jury verdict for defendant could (and should) stand despite the Court of Appeal's holding below.

JNOV may be granted only when "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the prevailing party]." Proposed Fed.R.Civ.P 50(a).[2] *See also* 9 Wright & Miller, Fed. Prac. & Proc. §2524 (citing numerous cases for the proposition that JNOV is permitted only when the evidence is so overwhelming that "reasonable men" could reach "but one conclusion").

By contrast, Fed.R.Civ.P. 52(a) provides that bench verdicts may be reversed if "clearly erroneous"; i.e., if an appellate court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). An appellate court may find "clear error" even when some competent evidence supports the verdict:

> A finding is "clearly erroneous" when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

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[2] The quoted language from the proposed new rule "effects no change in the existing standard," but simply spells out the standard which "was not expressed in the former rule, but was articulated in long-standing case law." (Advisory Committee Notes).

United States Gypsum Co., 333 U.S. at 395 (emphasis added). Thus, the clear error standard is significantly different than the JNOV standard. One may be "firmly convinced" an error was committed, even though reasonable minds could disagree precluding JNOV.[3]

For this reason, plaintiff is dead wrong when she asserts remand for a jury trial would be futile. The Court of Appeals' finding of "clear error" would have absolutely no bearing on whether a jury verdict for defendant could be upheld, because a jury verdict would be reviewed under an entirely different standard. And by plaintiff's express admission (supra, p. 1), *Lytle* requires that this case be remanded unless remand would be futile.

II. When A Trial Court Procedurally Errs By Entering A Forced Remittitur, Proper Appellate Procedure Requires A Remand, Not A Reversal.

Plaintiff apparently concedes that remand *usually* is the proper remedy to redress a forced remittitur, but then argues, "where there is clear evidence to support the jury's award [i.e., the remittitur was unwarranted], remand would be superfluous." (Brief Of Respondent, p. 11). This argument misses the mark, as defendant previously explained in an argument plaintiff totally ignores. (*See* Petition For A Writ Of Certiorari, pp. 16-17). Rather than repeat that argument here, defendant simply directs the Court's attention to the cited pages in its Petition, particularly the discussion of *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977). Remanding is the *only* way to restore *both* parties to where they would have been, had the trial court not erred proce-

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[3] That is why trial judges often *grant* new trials, based on "clear error," while simultaneously *denying* motions for JNOV.

durally. Otherwise, defendant winds up being penalized by the trial court's procedural error.

III. The Court Of Appeals Erred By Treating Certain Remedies As Mandatory, When The ADEA Expressly Commits Such Remedies To The Discretion Of The Trial Judge.

A. Prejudgment Interest Is Discretionary.

Plaintiff concedes that an award of prejudgment interest lies within the district court's discretion. (Brief Of Respondent, p. 12). However, she notes that the trial court denied her motion "for untimeliness and for no other reason." (*Id*). This, she says, constitutes an *implied* ruling against defendant on all "other" asserted grounds, because "[h]ad there been additional reasons showing plaintiff's lack of entitlement to prejudgment interest, the trial court could and should have stated them." (*Id*).

Plaintiff's argument is a *non-sequitur*, or at best reflects a gross misunderstanding of how trial judges operate in the real world. The district court ruled that plaintiff's motion was not properly before it, due to untimeliness. In those circumstances, the court had no reason to reach the merits of plaintiff's motion. It denied the motion on a procedural ground, without considering the alternative, substantive grounds. Plaintiff's assertion about "implied" rulings on those other issues is a pure fiction.

B. Front Pay Is Discretionary.

The Court of Appeals held that "front pay is a remedy presumed appropriate," citing *Davis v. Combustion Engineering*, 742 F.2d 916 (6th Cir. 1984) as its only authority for this proposition. (Opinion, App. p. A-8). Plaintiff admits *Davis* is "not exactly in point for the

proposition stated." (Brief Of Respondent, p. 13). Plaintiff's concession is a bit understated, since *Davis* stands for exactly the opposite conclusion. *Davis*, 742 F.2d at 922-23 ("Front pay does not appear to lend itself to a per se rule. It is neither mandatory nor prohibited by the Act").

Further, the Brief Of Respondent (pp. 13-14) lists a variety of cases in which front pay was *denied*, based on various factors. Given plaintiff's concession that front pay is *not* presumed appropriate in all cases, the Court of Appeals' contrary view must be rejected.

CONCLUSION

Plaintiff concedes that several aspects of the appellate holding below "normally" would constitute error. But then she makes all kinds of excuses as to why deviation from "normal" appellate procedure was warranted in this supposedly unique case. Or she tries to explain how the deviations, even though erroneous and ordinarily prejudicial, were harmless in this one instance.

This Court should not be misled by plaintiff's weak attempts to excuse the errors below. Errors clearly were committed, and they directly prejudiced defendant. Further, since the *published* appellate decision addresses questions of statutory interpretation, *and* general questions of appellate procedure, it has potential to affect many litigants beyond the parties to the present case.

This Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit, then should vacate and remand the challenged aspects of the decision below.

Respectfully submitted,

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